# IN THE UNITED STATES DISTRICT COURT
## FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HECTOR ALVAREZ PEREZ,　　　　　　:　　　　　CIVIL ACTION
　　　　　　　　　　　Plaintiff,　　　:
　　　　　　　　　　　　　　　　　　:　　　　　NO.  02-3779
　　　　　　v.　　　　　　　　　　　:
　　　　　　　　　　　　　　　　　　:
JO ANNE B. BARNHART,　　　　　　　:
COMMISSIONER OF THE　　　　　　　:
SOCIAL SECURITY ADMINISTRATION,　:
　　　　　　　　　　　Defendant.　　:


## MEMORANDUM

BUCKWALTER, S.J.　　　　　　　　　　　　　　　　　　　　　　　March 23, 2006


　　　　Plaintiff's motion seeks attorney's fees under 42 U.S.C. § 406(b).  The underlying

facts are known to the parties, are not in dispute and need not be recited.

　　　　The dispute arises over the defendant's contention that the fee is not reasonable;

that is, even though the Act provides in relevant part:

> Whenever a court renders a judgment favorable to a claimant . . . who was
> represented before the court by an attorney, the court may determine and
> allow as part of its judgment a reasonable fee for such representation, not
> in excess of 25 percent of the total of the past-due benefits to which the
> claimant is entitled by reason of such judgment,

defendant believes that this court is "charged with the ultimate responsibility [of] determining the

reasonableness of the fee request" (Defendant's brief at p. 2), a belief in which I concur.

　　　　In this case, the fees are recoverable from the lump sum of $82,254 awarded to

plaintiff for past due benefits.  The 25 percent fee of $20,563.50 is based upon a contingent fee

agreement between plaintiff and his attorney.  The fee is paid entirely from the proceeds of the

award and not by the defendant which previously paid $2,851.39 to plaintiff's counsel as reasonable attorney's fees under the Equal Access to Justice Act ((EAJA). Those fees are by law deducted from any fees awarded under § 406(b) so that the amount of fees that plaintiff's counsel would receive by this petition if the contingent fee agreement of 25 percent was awarded, is $17,712.11.

Both counsel cite <u>Gisbrecht v. Barnhart</u>, 535 U.S. 789, 122 S.Ct. 1817, (2002) as setting forth the method by which a reasonable fee should be calculated. In <u>Gisbrecht</u>, the court said:

> . . . we conclude, § 406(b) does not displace contingent-fee agreements as the primary means by which fees are set for successfully representing Social Security benefits claimants in court. Rather, § 406(b) calls for court review of such arrangements as an independent check, to assure that they yield reasonable results in particular cases. Congress has provided one boundary line: Agreements are unenforceable to the extent that they provide for fees exceeding 25 percent of the past-due benefits. § 406(b)(1)(A) (1994 ed., Supp. V). Within the 25 percent boundary, as petitioners in this case acknowledge, the attorney for the successful claimant must show that the fee sought is reasonable for the services rendered.

It seems to me initially, when an attorney, as in this case, sets his hourly rate at $148.51 in his EAJA fee request (See Plaintiff's Exhibit G), that establishes at least one factor the court should consider.

Secondly, the size of the award in relation to the time spent should be considered. Counsel for plaintiff spent 17.2 hours and seeks $20,563.50, or an hourly rate of $1,195.55.

Third, the court should also consider whether counsel delayed proceedings, thereby increasing fees. There is no evidence of that type of delay in this case.

Fourth, the reason for contingent fees and the fact that they are permitted, in this case up to 25 percent, must weigh in a determination of the reasonableness of the request.

Finally, here we have experienced counsel (26 years in litigating social security claims) who asserts that an attorney needs to charge a contingent fee client about 2.7 times the fee that would be charged a non-contingent fee client due to the risk of non-recovery.[1]

While not conceding the accuracy of that argument, defendant notes that based on the $148.51 hourly rate in the EAJA fee request, this would suggest a rate of $400 per hour to cover the risk of loss, while acknowledging that up to $600 per hour would not be unreasonable.

Considering all factors[2], I believe a reasonable award for petitioner should be $13,932.00

An order follows.

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1. Plaintiff's counsel does primarily social security work and has no comparable non-contingency hourly rate of his own. (See Plaintiff's brief at p. 9-10). There is no doubt that such a non-contingency rate would be higher than $148 per hour, however.

2. Those factors are: (1) EAJA hourly rate; (2) hourly rate in fee request computed by dividing hours spent securing past due benefits in award being requested; (3) unreasonable delay, if any, caused by counsel in proceedings to recover benefits; (4) the contingent agreement as a permitted practice in this area; (5) the experience of counsel and his assessment of risk of recovery as related to fee; and (6) government's argument relative to fees.

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| Plaintiff, | : | |
| | : | NO. 02-3779 |
| v. | : | |
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| JO ANNE B. BARNHART, | : | |
| COMMISSIONER OF THE | : | |
| SOCIAL SECURITY ADMINISTRATION, | : | |
| Defendant. | : | |

**ORDER**

AND NOW, this 23rd day of March, 2006, upon consideration of Plaintiff's

Motion for Award of Attorney Fees under 42 U.S.C. § 406(b) (Docket No.23 ), it is hereby

ORDERED that  the Court grants Plaintiff's Attorney's Motion and awards Plaintiff's attorney,

Michael Patrick Boyle, the sum of $13,932.00 in attorney's fees in accordance with 42 U.S.C.

§ 406(b), and orders him to reimburse plaintiff the sum of $2,851.39, previously paid in

accordance with 28 U.S.C. § 2412(d).  This will result in an actual net payment by plaintiff to his

attorney under Section 406(b) in the amount of $11,080.61.

BY THE COURT:

*s/ Ronald L. Buckwalter, S. J.*
RONALD L. BUCKWALTER, S.J.